FILED
JAN 13 1992
OFFICE OF THE CLERK

Supreme Court of the United States
October Term, 1991

GEORGE F. DENTON, *et al.*,

Petitioners,

v.

MIKE HERNANDEZ,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE NATIONAL PRISON PROJECT AND THE NORTHERN CALIFORNIA AFFILIATE OF THE ACLU IN SUPPORT OF RESPONDENT

ELIZABETH ALEXANDER
(Counsel of Record)
DAVID C. FATHI
NATIONAL PRISON PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION
1875 Connecticut Ave., NW, No. 410
Washington, DC 20009
(202) 234-4830

JOHN A. POWELL
STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION
132 W. 43rd Street
New York, NY 10036
(212) 944-9800

MATTHEW COLES
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA
1663 Mission Street, No. 460
San Francisco, CA 94103
(415) 621-2493

Counsel for *Amici Curiae*

CASILLAS PRESS, INC., 1717 K STREET, N.W., WASHINGTON, D.C. 20006

BEST AVAILABLE COPY

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 13

ARGUMENT 16

I. THE PRESENCE OF IMPLAUSIBLE ALLEGATIONS IN THE SAME OR A RELATED COMPLAINT DOES NOT JUSTIFY THE DISMISSAL OF PLAUSIBLE ALLEGATIONS 16

II. THE RESPONDENT'S COMPLAINTS SHOULD NOT HAVE BEEN DISMISSED AS FRIVOLOUS 19

A. The allegations of deprivation of clothing and shelter 19

B. The allegations of abuse 22

C. The allegations of rape 25

III. MECHANISMS FOR WINNOWING CASES UNDER §1915 MUST BE CONSISTENT WITH NEITZKE 30

CONCLUSION 34

TABLE OF AUTHORITIES

CASES Page

Black v. Stephens, 662 F.2d 181 (3d Cir. 1981) 24

Brown v. Hughes, 894 F.2d 1533 (11th Cir. 1990) 24

Burton v. Livingston, 791 F.2d 97 (8th Cir. 1986) 24

Corselli v. Coughlin, 842 F.2d 23 (2d Cir. 1988) 24

Denton v. Hernandez, 110 S.Ct. 37 (1989) (mem.) 13

DeShaney v. Winnebago County DSS 109 S.Ct. 998 (1989) 21

El Amin v. Pearce, 750 F.2d 829 (10th Cir. 1984) 33

Felix v. McCarthy, 939 F.2d 699 (9th Cir. 1991) 23

Gray v. Spillman, 925 F.2d 90 (4th Cir. 1991) 23

Haines v. Kerner, 404 U.S. 519 (1972) 22

H.C. by Hewett v. Jarrard, 786 F.2d 1080 (11th Cir. 1986) 24

Hernandez v. Denton, 929 F.2d 1374 (9th Cir. 1991) 13, 20, 25, 29

Hernandez v. Denton, 861 F.2d 1421 (9th Cir. 1988). 12, 13

Hudson v. McMillian, 111 S.Ct. 1579 (1991) (mem.), granting cert. to 911 F.2d 727 (5th Cir. 1990) 23, 24

King v. Blankenship, 636 F.2d 70 (4th Cir. 1980) 23

Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978) 33

McCord v. Maggio, 927 F.2d 844 (5th Cir. 1991) 24

McHenry v. Chadwick, 896 F.2d 184 (6th Cir. 1990) 24

Neitzke v. Williams, 490 U.S. 319, 109 S.Ct. 1827 (1989). . . . . passim

Norris v. District of Columbia 737 F.2d 1148 (D.C. Cir. 1984) 24

Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985) 32

Wilson v. Barrientos, 926 F.2d 480 (5th Cir. 1991) 32

Wilson v. Seiter, 111 S.Ct. 2321 (1991) 20, 21

CONSTITUTIONAL PROVISIONS, STATUTES, AND FEDERAL RULES:

Fifth Amendment to the United States Constitution 23

Eighth Amendment to the United States Constitution. 20, 23, 24

Fourteenth Amendment to the United States Constitution 23, 24, 32

28 U.S.C. §1915 . . . . . passim

42 U.S.C. §1983 2

Fed.R.Civ.P. 12 . . . . .14, 22, 24, 31

OTHER AUTHORITIES:

Comprehensive Textbook of Psychiatry (H. Kaplan and B. Sadock ed. 4th ed. 1985) 28

The Harvard Guide to Modern Psychiatry (A. Nicholi ed. 1978) 28

Wright & Miller, Federal Practice and Procedure Civil 2d (1990) . . 31

W. Wooden and J. Parker, Men Behind Bars: Sexual Exploitation in Prison (1982) 28

No. 90-1846

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1991

GEORGE F. DENTON, et al.,

Petitioners,

v.

MIKE HERNANDEZ,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE NATIONAL PRISON PROJECT AND THE NORTHERN CALIFORNIA AFFILIATE OF THE ACLU IN SUPPORT OF RESPONDENT

INTEREST OF AMICI[1]

The American Civil Liberties Union (ACLU) is a nation wide, non-partisan organization of nearly 300,000 members. The ACLU is dedicated to preserving the Bill of Rights. The ACLU of Northern California is

---

[1] The parties have consented to the filing of this brief, as indicated by their letters of consent filed with the Clerk of the Court.

one of the ACLU's state affiliates. The ACLU established the National Prison Project in 1972 to protect and promote the constitutional and civil rights of prisoners.

The ACLU has an interest in the standard adopted by the Court for the dismissal of an unrepresented, indigent prisoner's §1983 challenge to the alleged denial of his constitutional rights because of the ACLU's concern for preserving meaningful access to the federal courts for all persons seeking to raise constitutional claims.

STATEMENT OF THE CASE

This case involves the appropriateness of the trial court's use of 28 U.S.C. §1915(d)[2]

---

[2] §1915 provides in pertinent part as follows:

> (a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.
>
> * * *
>
> (d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

to dismiss several complaints of an unrepresented indigent prisoner. Relevant allegations in each complaint are summarized below:

1. Civ. S-83-0645-LKK (Court of Appeals 86-2139).

The respondent prisoner alleged that "he was sexually assaulted and raped by correctional officers in cell 1303 Building 2" at the California State Prison at Folsom

on the night of July 29, 1982. Amended Complaint 6/25/84, p.5. He further alleged that he discovered "evidence and signs of rape on his clothing" that day and that he overheard staff and other prisoners taunting and ridiculing him about the rape. Id. He alleged that he told the disciplinary committee at the prison about the rape but that he was never given the results of any investigation into his allegations. Id. at 5-6. He did not identify the correctional officers allegedly responsible for the rape.

Respondent also alleged that he was forced to sleep without a mattress for one night. He further alleged that he was denied a pair of shoes for approximately thirty days during a time when he had access to only a single blanket, borrowed from another prisoner, and suffered from freezing weather conditions because he was housed in a cell located across from broken windows. Id. at 8.

2. Civ. S-83-1348-LKK (Court of Appeals 87-1693).

The respondent alleged that he believed that one or more other prisoners at the California Medical Facility at Vacaville had raped him on July 29, 1983, and that he had found signs and evidence of rape on his clothing. Notice of Motion and Motion for Leave to Amend Civil Rights Complaint and Supplemental Pleadings under Rule 15, and Demand for Jury Trial, 6/17/84, p.4. (Hereafter "Second Complaint"). Attachment G to the complaint was an affidavit signed by a fellow prisoner, averring that on the night of July 29, 1983, he "witnessed inmate Dushane B-71187 and inmate Milliard B-30802 assault and rape inmate Mike Hernandez as he lay asleep in bed 206 in the N-2 unit dorm."

The respondent further alleged that he had discovered a number of needle puncture wounds on various parts of his body. Second Complaint at 4. He also alleged that he was hit on the head by one

or more other prisoners while he was asleep on December 14, 1983, and that he had found evidence of sexual assault on his clothing on December 17, 1983. Id. at 6. Respondent alleged that he was injured, and that the injuries were caused by the petitioners' malicious conduct in housing him in the unit. Id. at 8.

Attachment B to the Second Complaint is a statement by respondent signed under pain of perjury averring in relevant part that on July 30, 1983, respondent told petitioners Hartman and Ingle[3] that he had been the victim of a rape, that he had found feces and semen stains on his shorts, and that he believed he had been raped, after being hit in the head, by one or more of the

---

[3] The named petitioners in each complaint were alleged to be staff at the facility in which respondent was confined at the time of the complaint. The Second Complaint identifies petitioner Hartman as a lieutenant and petitioner Ingle as a sergeant at the California Medical Facility. Second Complaint at 3.

other prisoners housed in his dorm. The statement further averred that he had told petitioner Ingle that someone had hit him in the head during the night or morning and that he believed that someone had injected him with an unknown substance. It further averred that he had displayed a number of needle puncture wounds to staff members on August 3. Attachment D averred additional instances of discovering puncture wounds and indicated that respondent believed he had been drugged and raped on August 5, 1983.

3. Civ. S-85-0084-LKK (Court of Appeals 87-1964).

In relevant part, respondent alleged that, while he was confined at the California Medical Facility at Vacaville on or about January 13, 1984, petitioner McIntyre, a staff correctional officer, allowed himself and two prisoners into the respondent's cell, where they drugged, sexually assaulted, and possibly raped respondent while he was asleep. Complaint,

12/28/84, pp. 15-16. (Hereafter "Third Complaint"). Respondent alleged that similar events occurred on January 27, 1984. Id. at 16. He further averred that similar events took place on other occasions, and alleged a number of additional instances of discovering puncture marks on his body. The complaint alleges a total of sixteen such events.[4]

---

[4] The sixteen instances were alleged as follows:

(1) On or about January 13, 1984, by petitioner McIntyre and two prisoners (described in text, supra) (id. at 15);

(2) on or about January 27, 1984, by petitioner McIntyre and two prisoners (described in text, supra) (id. at 16);

(3) on March 23 by someone respondent believed to be petitioner Perdoni, based on respondent's discovery of needle marks on his body (id. at 16-17);

(4) on June 29, 1984 (similar allegations to (3), supra) (id. at 17);

(5) on August 4, 1984 (similar allegations to (3), supra) (id. at 17-18);

(6) on August 23, 1984 (similar allegations to (3), supra) (id.);

Exhibit H to the Third Complaint is a

(7) on September 11, 1984, by petitioners Price and Fitzgerald, based on the discovery of a needle mark (id. at 18);

(8) on September 16, 1984, by petitioner Price, based on the discovery of needle marks (id.);

(9) on September 21, 1984, possibly by petitioner Perdoni or McIntyre, based on the discovery of needle marks, and because, on awakening, respondent felt nauseous (id. at 18-19);

(10) on September 26, 1984, by petitioner McIntyre, based on the discovery of a needle mark (id. at 19);

(11) on October 8, 1984, by petitioner McIntyre, based on the discovery of a needle mark (id.),

(12) on October 26 or 27, 1984, by petitioner McIntyre, based on the discovery of a needle mark (id. at 19-20);

(13) on November 22 or 23, 1984, by petitioner McIntyre, based on the discovery of needle marks (id. at 20);

(14) on December 5, 1984, by petitioner Tomlinson, based on the discovery of needle marks (id.);

(15) on December 9, 1984, by petitioner McIntyre, based on the discovery of needle marks (id. at 21); and

(16) on December 10, 1984, by petitioner McIntyre, based on the discovery of a needle mark. (id.)

declaration from another prisoner indicating that on January 13, 1984, the declarant saw petitioner McIntyre unlock the respondent's cell door and two other prisoners enter the cell. When the declarant returned from a shower, he averred, he noticed that respondent was being sexually assaulted by the two other prisoners. After the two prisoners left the cell, petitioner McIntyre locked respondent's door. The declarant also noticed petitioner McIntyre unlock respondent's door on January 27, 1984, and saw two prisoners enter the cell.

Respondent also alleged that he was harassed and verbally abused by petitioner Smith and other officers on November 22, 1983, (Third Complaint at 14) and that petitioner Smith assaulted respondent by pulling his arm and wrist and pinning him by the neck against the wall on December 19, 1983. Id. at 15. The respondent attached two affidavits from fellow prisoners. One

described petitioner Smith as grabbing respondent by the arm and wrist and slamming him against the wall (Attachment F); the other described Smith as pinning respondent by the neck and twisting his right arm. Attachment G.

4. Civ. S-84-1074-LKK
Civ. S-84-1198-LKK

These two cases were not appealed to the court of appeals. The Magistrate Judge recommended dismissal of these two cases in the same opinion recommending dismissal of the three cases discussed above. The opinion of the Magistrate Judge discusses them in conjunction with Civ. S-85-0084-LKK, supra. The opinion characterizes these two cases that respondent did not appeal, as well as S-85-0084, supra, as follows:

> These complaints all allege that plaintiff was drugged and assaulted by prison guards at Vacaville. Each complaint alleges that different guards were responsible for the assault and alleges that the assaults were wholly

> separate incidents. The rapes allegedly occurred on different nights, spanning the period from August, 1983 to November, 1984.

Magistrate's Findings and Recommendations, 4/16/86, p.4.

In dismissing all five complaints, the Magistrate Judge said that "[a]lthough each complaint taken separately, is not necessarily frivolous, a different picture emerges from a reading of all five complaints together." Id. at 5. The Magistrate Judge concluded that, in light of all five complaints, the facts alleged appeared "wholly fanciful," and therefore dismissed the complaints as frivolous. Id.

On May 5, 1986, the district court entered judgment against respondent. Respondent appealed the dismissal of the first three of the five cases discussed above.

The court of appeals vacated the dismissals in Hernandez v. Denton, 861 F.2d

1421 (9th Cir. 1988). In Denton v. Hernandez, 110 S.Ct. 37 (1989) (mem.), this Court remanded for further consideration in light of Neitzke v. Williams, 490 U.S. 319, 109 S.Ct. 1827 (1989). The court of appeals subsequently issued a new opinion, again vacating the dismissals. Hernandez v. Denton, 929 F.2d 1374 (9th Cir. 1991). This Court granted a writ of certiorari on November 4, 1991.

SUMMARY OF ARGUMENT

This Court should reject the argument of the Magistrate Judge below that complaints that are not individually frivolous become frivolous when taken together. Taken to its logical conclusion, the approach of the Magistrate Judge would allow the presence of improbable allegations in the same or other complaints to bar the adjudication of plausible allegations, with the result that the respondent prisoner in this case would

always be barred from federal court as long as he were to remain indigent.

The radical implications of the rationale for dismissal of the Magistrate Judge are demonstrated by the dismissal of respondent's allegations of deprivation of shoes for thirty days, and of physical abuse by guards. These allegations raise no issues of factual implausibility. While these claims may require amendment or the naming of additional parties in order to survive a Fed.R.Civ.P. 12(b)(6) motion, Neitzke v. Williams, 490 U.S. 319 (1989), counsels that complaints with such defects should not be dismissed under §1915.

While many of the twenty allegations of sexual assault made by respondent are alleged on the apparent basis of finding unexplained needle marks or on a similar basis, some of the allegations of rape stand on a different footing. In one of the allegations, the respondent directly alleges

that he was raped by an identified petitioner. Another allegation is supported by an affiant who states that he saw the respondent raped while he slept by two prisoners, and that the prisoners were allowed into the cell by an identified petitioner. While respondent's implausible additional allegations of sexual assault may undermine the credibility of these allegations, they do not render them frivolous. To dismiss all of respondent's allegations of sexual assault without any factual inquiry is to leave him without access to legal protection and to ignore the possibility that a real event may have triggered the later repeated and stereotyped allegations of sexual assault.

As set forth in Neitzke, Congress intended that indigent persons enjoy meaningful access to the courts, and that legislative policy judgment must be respected. At the same time, enforcing

§1915 as written by Congress does not preclude the federal courts from the use of appropriate evidentiary mechanisms short of trial that will effectively winnow out frivolous cases while preserving access to the federal courts.

ARGUMENT

I. THE PRESENCE OF IMPLAUSIBLE ALLEGATIONS IN THE SAME OR A RELATED COMPLAINT DOES NOT JUSTIFY THE DISMISSAL OF PLAUSIBLE ALLEGATIONS

In this case an indigent, unrepresented person, apparently under treatment for mental problems, has alleged a number of events. Some of the alleged events, taken by themselves, cannot be said to be inherently implausible. Other alleged events are highly implausible in themselves. The issue is whether the presence of implausible allegations in the same complaint, or in a separate complaint filed by the same indigent person, so contaminates the plausible allegations that all the

allegations should be dismissed as frivolous under the provisions of 28 U.S.C. §1915(d) without examination of the plausible allegations.

The amici urge the Court to reject, as inconsistent with Neitzke, the conclusion of the Magistrate Judge below that complaints that are not individually frivolous become frivolous when viewed together.

The presence of highly improbable allegations may undermine the credibility of the other allegations, but should not become an absolute bar to resolution of the plausible allegations. If this Court reverses the court of appeals, the Court's decision will bar the adjudication of plausible allegations whenever implausible allegations are also present. As a result, many litigants in respondent's position will be effectively precluded from vindicating their rights in federal court.

In particular, mentally ill prisoners are almost always indigent. Many such prisoners are also extremely vulnerable to exploitation, including sexual abuse, by other prisoners. Moreover, mentally ill prisoners can be irritating to staff, and may be less able than other prisoners to control their behavior and conform to prison rules. Thus, mentally ill prisoners are at increased risk of both abuse by other prisoners and use of force by staff.

At the same time, some mental illnesses, such as schizophrenia, can result in delusions and even hallucinations. A prisoner with such an illness may remember an event in a distorted manner; conflate two or more events; or imagine events that never took place.

Thus, it is quite possible that a complaint filed by a mentally ill prisoner will contain both factually accurate allegations of abuse by prisoners or staff,

and allegations that are, in whole or in part, a product of the prisoner's mental illness. To dismiss all complaints filed by a given prisoner, simply because some of the allegations in some of his or her complaints seem implausible, places such prisoners beyond the protection of the federal courts. If the presence of implausible allegations in Complaint A can lead to the dismissal as frivolous of otherwise plausible allegations in Complaint B, the prisoner in question can never file a non-frivolous complaint.

II. THE RESPONDENT'S COMPLAINTS SHOULD NOT HAVE BEEN DISMISSED AS FRIVOLOUS

The respondent's allegations can be classified into three general categories:

A. The allegations of deprivation of clothing and shelter.

The majority of the appellate panel, in its original decision, vacated the dismissal of the claim that respondent had been deprived of shoes for thirty days because, it held, respondent might be able

to state an Eighth Amendment claim by amending his complaint. Hernandez v. Denton, 861 F.2d at 1423. The dissent disagreed because, assuming that deprivation of a pair of shoes involved the wanton infliction of pain, respondent had not named as a defendant the person who denied him the shoes.

Given that respondent had alleged that the thirty-day deprivation of shoes occurred at a time when he had only one blanket and suffered from freezing weather conditions because his cell was across from broken windows, it cannot be said that this allegation is legally frivolous. Cf. Wilson v. Seiter, 111 S.Ct. 2321, 2327 (1991):

> Some conditions of confinement may establish an Eighth Amendment violation "in combination" when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth or exercise -- for example, a low cell temperature at night combined with a failure to issue blankets.

(Emphasis and citations omitted). See also DeShaney v. Winnebago County DSS, 109 S.Ct. 998, 1005-1006 (1989) (identifying clothing and shelter as basic human needs that the State is required to provide to an individual when it has rendered that individual unable to care for himself or herself).

It may be true that, at the time of the complaint, respondent failed to name an appropriate defendant. But there is no reason to believe that this defect could not be cured by an amendment to the complaint and the addition of appropriate parties. Particularly because respondent was unrepresented, it would be fundamentally unfair to dismiss this allegation simply because respondent had failed to name an appropriate defendant. In Neitzke, the Court noted that, if the indigent prisoner's

claim had been judged under the proper standard of Fed.R.Civ.P. 12(b)(6), he would have had an opportunity to amend his complaint before adjudication of the motion to dismiss. 109 S.Ct. at 1834. Failure to name a necessary party is also ordinarily addressed through a Fed.R.Civ.P. 12(b)(6) or (b)(7) motion. See Fed.R.Civ.P. 12(b). Accordingly, under the rationale of Neitzke, the respondent should have been given an opportunity to replead prior to dismissal. See also Haines v. Kerner, 404 U.S. 519, 520 (1972) (indigent prisoners should not be denied the opportunity to present evidence on a claim because of inartful pleading).

B. The allegations of abuse.

As noted in the Statement of the Case, the respondent alleged that he suffered both verbal and physical abuse from staff. Complaint Civ. S-85-0084-LKK alleges that respondent was assaulted by petitioner Smith, who slammed respondent against the

wall, pinned his neck, and pulled or twisted his arm.

These allegations state a claim under the Eighth Amendment. See, e.g., Felix v. McCarthy, 939 F.2d 699, 701-702 (9th Cir. 1991), (holding that a prison guard violated well-settled law in 1985 by throwing a prisoner across a hall against a wall, causing bruises, soreness and emotional damage).

This Court has under review a case that could change the law to impose a "significant injury" requirement in prison abuse cases. Hudson v. McMillian, 111 S.Ct. 1579 (1991) (mem.), granting cert. to 911 F.2d 727 (5th Cir. 1990).[5] But even if this

---

[5] Every court of appeals, other than the Fifth Circuit, that has considered the issue has rejected a "significant injury" requirement as a prerequisite for stating an Eighth Amendment claim against staff for prisoner abuse. See Gray v. Spillman, 925 F.2d 90, 93 (4th Cir. 1991) (rejecting serious injury requirement under Fifth and Fourteenth Amendments and construing King v. Blankenship, 636 F.2d 70, 72 (4th Cir. 1980) (prison case) as specifically

Court were to impose a "significant injury" requirement in Hudson, Neitzke counsels that the sufficiency of respondent's claim should be considered under Rule 12(b)(6) rather than §1915(d), so that respondent would have an appropriate opportunity to amend the complaint to allege what, if any, injuries he suffered as a result of the incident.

---

rejecting a serious injury requirement); McHenry v. Chadwick, 896 F.2d 184, 187 (6th Cir. 1990); Corselli v. Coughlin, 842 F.2d 23, 26 (2d Cir. 1988); Burton v. Livingston, 791 F.2d 97, 100 (8th Cir. 1986); Norris v. District of Columbia, 737 F.2d 1148, 1151 (D.C. Cir. 1984). See also H.C. by Hewett v. Jarrard, 786 F.2d 1080, 1086 (11th Cir. 1986) (gratuitously slamming juvenile prisoner against wall, resulting in no permanent injuries, violated due process clause); Black v. Stephens, 662 F.2d 181 (3d Cir. 1981) (display of revolver with threat to kill). Cf. Brown v. Hughes, 894 F.2d 1533, 1538 (11th Cir. 1990) ("Deliberately inflicted pain, as with an electric cattle prod, does not become unimportant and unactionable under the Eighth Amendment simply because the pain produced is only momentary"). Moreover, the Fifth Circuit has held, in its most recent relevant decision, that its "significant injury" requirement can be satisfied by a showing that the prisoner endured pain and suffering significant enough to justify monetary relief. McCord v. Maggio, 927 F.2d 844, 849 (5th Cir. 1991).

The need to apply the Neitzke rule is particularly great in this case because, at the time he filed his complaint, respondent could not have foreseen the necessity of alleging a "significant injury" as a result of the assault.

C. The allegations of rape.

The three complaints that respondent appealed to the court of appeals allege a total of twenty separate instances of rape.[6] The petitioners allege in their Statement of the Case at p.5 that "respondent had no personal recollection of any of the assaults but deduces that they occurred from his claimed discovery of fecal and semen stains on his T-shirts and perceived needle wounds on his arms and legs." A similar

---

[6] The court of appeals (see, e.g., 929 F.2d at 1376) and the petitioners (see, e.g., Petitioners' Brief on the Merits at 5) repeatedly refer to twenty-eight allegations of rape. This number apparently includes allegations of rape made in the two complaints that respondent did not appeal to the court of appeals.

characterization of the record occurs in the amicus brief of the United States. See Brief at p.2. (Citing the petition for writ of certiorari at 4).

This characterization, while correct for many of the alleged incidents of rape, is not accurate for the incident alleged in Civ. S-83-0645-LKK to have occurred on July 29, 1982. That complaint avers flatly that respondent was raped and sexually assaulted at the stated time and place. The complaint does not indicate that his only knowledge of the rape came from finding stains on his clothing; on the face of the complaint, the respondent is simply mentioning the stained clothing as evidence that the rape took place.

In Civ. S-83-1358-LKK respondent states that he "believed" that he was raped, on July 29, 1983, and the supporting affidavit from another prisoner indicates

that the event took place while the respondent was asleep.

It seems unlikely that two prisoners could have raped respondent while he slept. However, the prisoner affiant would have been in a better position to determine that respondent was being sexually assaulted than to determine whether respondent was asleep, comatose, or apparently non-responsive for some other reason, including reasons related to his apparent mental condition. Neither of the latter possibilities are so intrinsically implausible that dismissal of this allegation as frivolous is justified.[7]

The credibility of these two allegations of sexual assault may seem undermined by the other allegations of assault. However, in the context of a prison, allegations of repeated rape are not

---

[7] For similar reasons the allegations of rape on January 13 and 27, 1984, made in Civ. 83-0084-LKK, and supported by a declaration of a fellow prisoner, should not be dismissed as frivolous.

intrinsically less credible than allegations of a single sexual assault. Prisoners who are known to have been victims of sexual assault are frequently at substantially increased risk for further sexual victimization.[8] While the particular nature of the additional allegations of sexual assault in this case raises obvious questions about the credibility of respondent,[9] these allegations cannot by

---

[8] See W. Wooden and J. Parker, Men Behind Bars: Sexual Exploitation in Prison 1-7, 99-120 (1982) (based on study conducted in the California prison system).

[9] While it is of course hazardous to engage in speculation on an undeveloped record, one plausible hypothesis is that the stereotyped additional allegations of sexual assault represent, in a distorted form, the respondent's attempt to communicate about an earlier, real event that was traumatizing to him. See Comprehensive Textbook of Psychiatry 669 (H. Kaplan and B. Sadock ed. 4th ed. 1985); (Many events, including rape, can precipitate schizophrenia in vulnerable individual; symptoms of the illness may be seen as a way of expressing meaning of initiating event); see also The Harvard Guide to Modern Psychiatry, 220 (A. Nicholi ed. 1978).

themselves render non-frivolous allegations frivolous.

The comments of the court of appeals regarding the sexual assault allegations suggest a similar approach. See, e.g., Hernandez v. Denton, 929 F.2d at 1376:

> The defendants ask us to hold that Hernandez' allegations of 28 rapes are "fantastic or delusional scenarios," and affirm the district court's dismissal. If we were to affirm the district court's dismissal of all the claims as factually frivolous, however, we would have to hold that all 28 rapes were delusions and that none of them occurred. While it is hard to believe that so many similar incidents actually happened, we cannot say that none of them occurred without making the kinds of credibility determinations that are impermissible in deciding whether a claim is baseless under section 1915.

(Citation omitted).

III. MECHANISMS FOR WINNOWING CASES UNDER §1915 MUST BE CONSISTENT WITH NEITZKE

Of course, deciding that a mentally ill prisoner is so likely to fail to be a credible witness at trial that he or she is unlikely to prevail would be a very simple shortcut to dispose of cases. But this is precisely the shortcut rejected by the Court in Neitzke:

> We recognize the problems in judicial administration caused by the surfeit of meritless in forma pauperis complaints in the federal courts, not the least of which is the possibility that meritorious complaints will receive inadequate attention or be difficult to identify amidst the overwhelming number of meritless complaints. Nevertheless, our role in appraising petitioners' reading of §1915(d) is not to make policy, but to interpret a statute. Taking this approach, it is evident that the failure to state a claim standard of Rule 12(b)(6) and the frivolousness standard of §1915(d) were devised to serve distinctive goals, and that while the overlap

> between these two standards is considerable, it does not follow that a complaint which falls afoul of the former standard will invariably fall afoul of the latter. Appealing though petitioners' proposal may appear as a broadbrush means of pruning meritless complaints from the federal docket, as a matter of statutory construction it is untenable.

(Citation omitted).

The appropriate mechanism for dealing with complaints such as those filed by respondent is not to dismiss them summarily in toto. Rather, as respondent has suggested, the better approach is to develop an efficient system for reviewing cases short of trial. Indeed, Fed.R.Civ.P. 12(d) specifically provides for preliminary hearings for defenses raised pursuant to 12(b)(1) through (7). See generally Wright & Miller, Federal Practice and Procedure: Civ. 2d §1373 (1990).

Both the Fifth and Tenth Circuits have developed other possible approaches to the

problem.[10] In the Fifth Circuit, the procedure is known as a "Spears hearing." Under that procedure, a magistrate judge conducts an evidentiary hearing to determine whether the complaint should be dismissed as frivolous. The proceeding is in the nature of a motion for a more definite statement. See Spears v. McCotter, 766 F.2d 179, 181-182 (5th Cir. 1985). See also Wilson v. Barrientos, 926 F.2d 480, 482 (5th Cir. 1991) (Spears hearing promotes the twin goals of assuring meaningful access to the

---

[10] In amici's view, such truncated procedures, while preferable to summary dismissal, nevertheless raise obvious due process concerns. If constitutionally permissible in this context, it is only because §1915(d) bestows on district judges "the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless." Neitzke, 109 S.Ct. at 1833. For similar reasons, amici believe that truncated procedures that rely on the judgment of a magistrate judge to clarify the record are preferable to those that initially rely on the judgment of prison officials.

federal courts and eliminating meritless cases from the federal docket).

The Tenth Circuit uses a "Martinez report," which is an administrative record compiled by the correctional authorities. See Martinez v. Aaron, 570 F.2d 317 (10th Cir. 1978). See also El Amin v. Pearce, 750 F.2d 829, 832 (10th Cir. 1984) (purpose of "Martinez report" is to determine jurisdiction and clarify issues; it does not authorize the substitution of prison officials for the court as fact-finders).

If respondent were allowed to amend his complaint and add relevant parties, as contemplated by the decision of the court of appeals, a procedure short of full trial may well prove useful. For example, examination of the cellhouse logs and staffing rosters from the dates of the alleged events may clarify whether dismissal is appropriate for some allegations. The respondent's medical records may also prove helpful.

Whatever procedure is adopted, however, it must be consistent with the twin goals of winnowing meritless cases and preserving meaningful access to the courts. Anything less places respondent literally beyond the ken of the courts. Under the logic of the Magistrate Judge's construction of §1915(d) as allowing dismissal of all of respondent's complaints as frivolous because some of the allegations were of questionable credibility, this respondent presumably can never file a non-frivolous complaint. Such a result would be manifestly inconsistent with congressional intent in enacting §1915 and unconscionable as a matter of policy.

CONCLUSION

For the above reasons, the amici urge the Court to affirm the decision of the court of appeals.

Respectfully submitted,

Elizabeth Alexander*
David C. Fathi
National Prison Project
of the American Civil
Liberties Union Foundation
1875 Connecticut Ave., NW
Suite 410
Washington, D.C. 20009
(202) 234-4830

John A. Powell
Steven R. Shapiro
American Civil Liberties Union
132 W. 43rd Street
New York, NY 10036
(212) 944-9800

Matthew Coles
American Civil Liberties Union
of Northern California
1663 Mission Street, No. 460
San Francisco, CA 94103
(415) 621-2493

Counsel for Amici Curiae

*Counsel of Record